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## Surf's Up: The Implications of Tort Liability in the Unregulated Sport of Surfing

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## COMMENTS

### SURF'S UP: THE IMPLICATIONS OF TORT LIABILITY IN THE UNREGULATED SPORT OF SURFING

#### I. INTRODUCTION

Surfing has long been a sport free from legal consequences and legislative intervention. The mentality and customs of the sport teach peace, love, and respect for fellow surfers.<sup>1</sup> However, with popular surf locations becoming overcrowded and collision injuries increasingly prevalent,<sup>2</sup> the idea of “surfer liability” and the potential for a tort claim in negligence is becoming more of a reality in the surfing community every day.<sup>3</sup> Surfing, through an increase in worldwide publicity, has steadily grown in popularity yielding a saturation of common surf spots.<sup>4</sup> This overcrowding, combined with a disrespect for, or ignorance of, well-known surf customs designed to promote safety and order in the water are two possible explanations for collision accidents.

Take the unfortunate and potentially avoidable injury suffered by Mike Donovan, a local Newport, Oregon surfer on Memorial Day 2007.<sup>5</sup> Donovan was surfing at a popular beach when he was seriously

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1. Forum, *Law of the Surf*, 5 S. CROSS U. L. REV. 228, 230 (2000), available at [http://www.scu.edu.au/schools/lawj/law\\_review/law\\_of\\_the\\_surf\\_forum.pdf](http://www.scu.edu.au/schools/lawj/law_review/law_of_the_surf_forum.pdf) [hereinafter Forum, *Law of the Surf*].

2. See SHAUN TOMSON & PATRICK MOSER, *SURFER'S CODE* 108 (2006) (explaining that the sport is growing more crowded everyday); Cheryl Clark, *Surfers Get Some Free Medical Advice: Be Upfront in Describing Injuries, Doctor Suggests*, SAN DIEGO UNION-TRIBUNE, Dec. 1, 2004, at B (noting the number of surfers in the United States increased nearly 50% to 2.2 million from 1987 to 2000). See generally Andrew Nathanson et al., *Surfing Injuries*, 20 AM. J. EMERGENCY MED. 155 (2002) (describing common surfing injuries and providing statistics on them).

3. See Forum, *Law of the Surf*, *supra* note 1, at 234.

4. See *id.* at 240.

5. See generally Laura Eberly, *Surfing's Rise in Popularity Brings Safety Concerns*, NEWPORT NEWS-TIMES, June 22, 2007, available at

injured by an errant board from another surfer who chose not to secure his board with a leg leash—a customary safety precaution that attaches the surf board to one’s ankle.<sup>6</sup> Donovan needed stitches to his head and shoulder, as well as fourteen external staples to his skull to “keep everything together.”<sup>7</sup> Surfers are not required to wear leg leashes, and many advanced surfers enjoy the challenge and freedom of surfing without a leash; however, the surfing community agrees that leashes are a necessary precaution in crowded conditions.<sup>8</sup> Accidents like Donovan’s also occur when surfers violate another safety custom: abandoning the surf board before diving under a crashing wave and rendering the surfers behind vulnerable to fatal injury from the oncoming board.<sup>9</sup> Additional customary norms exist in surfing, which are designed to further protect participants from collision with another board or surfer and prevent the type of serious injury suffered by Donovan.<sup>10</sup> These customs exemplify how surfing has regulated itself throughout history and how it will continue to do so in the future.

As a result of the expanding surfer population and possibility for serious injury, attempts have been made in the past at different types of legislation to curb the potentially harmful effects of surfer collision,<sup>11</sup> yet most attempts have been unsuccessful. For example,

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<http://www.newportnewstimes.com/articles/2007/06/22/sports/sports01.txt>  
(describing Donovan’s surfing accident).

6. *Id.* After the accident, Donovan commented, “[t]he whole environment had this really chaotic feel and people weren’t looking when they were ditching their boards.” *Id.*

7. *Id.*

8. *Id.*

9. See Surfrider Foundation Australia, *Surfers Code of Ethics*, <http://www.surfrider.org.au/about/surfethics.php> (last visited Jan. 30, 2007).

10. See *infra* Part III.A.

11. See, e.g., Carol G. Williams, *City Tables Proposed Surfers’ “Leash Law” for Additional Research*, ASBURY PARK PRESS (N.J.), Aug. 29, 2007 (discussing a proposed ordinance in New Jersey to require surfers in crowded beach areas to wear a leash). See also Town of Wrightsville Online, <http://www.townofwrightsvillebeach.com/surfing.htm> (last visited Jan. 31, 2008). The town’s website imposes surfing regulations for its beaches by 1) mandating that surfer’s use a leg leash, 2) restricting the different areas, days, and times when surfing is permitted, and 3) prohibiting reckless surfing. *Id.* This is one example of a local community self-regulating surfing on its beaches.

legislation was proposed in California to label a surfboard a dangerous weapon, turning injuries inflicted by a board into a felony.<sup>12</sup> In other surfing communities, advocates of regulating the sport have proposed the idea of “surf police” who would patrol surf locations on jet skis and issue tickets for violating leash laws and other beach community ordinances, surfing customs, or any violence that may result from a violation.<sup>13</sup> While this may be a backlash to the rise of “surf rage,”<sup>14</sup> undoubtedly, the potential for future regulation of the sport in a constantly evolving, litigious society remains a concern.

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12. See Forum, *Law of the Surf*, *supra* note 1, at 232 (indicating the implications of such legislation in California, where mandatory sentencing and the “three strikes” law apply); see also Daniel Nazer, *The Tragicomedy of the Surfers’ Commons*, 9 DEAKIN L. REV. 655, at Part VI.C (2004), available at <http://search.austlii.edu.au/au/journals/DeakinLRev/2004/29.html#fn350> (describing in detail the attempt by San Diego’s chief lifeguard, Chris Brewster, to propose the *California Open Waves Act* for the purpose of controlling surfer localism).

13. See Alex Wilson, *Rabbit Bartholomew Speaks Out Against Formation of Surf Police*, SURFER MAG., available at <http://surfermag.com/features/onlineexclusives/Rabstrfplice/> (last visited Jan. 31, 2008). Rabbit Bartholomew, an Australian professional surfer, comments on implications of surf police on the Gold Coast: “You have to ask yourself how it could be implemented for starters. . . . I mean, the logistics would be enormous. A huge force would be required to implement it, leaving the rest of the community to deal with robberies, break-ins, home invasions and other major crime. Real crime.” *Id.*; see also Alex Wilson, *Big Brother Is Watching: Violence and Crowds May Lead to Surf Police on Gold Coast*, SURFER MAG., available at <http://surfermag.com/features/onlineexclusives/surfpolice/> (last visited Jan. 11, 2008) (“In Australia . . . and the U.S., law enforcement and governmental involvement in the surf zone is not entirely unprecedented. Several incidents of surf rage violence have resulted in the extension of the long arm of the law into lineups in both countries in the past. However, those prior cases seem to have been reactive rather than proactive, and while violence in any forum is typically counterproductive and should be avoided and curtailed, it seems as if this particular proposal to regulate Australian beaches is more intrusive than many who would be affected by it would like.”).

14. “Surf rage” is the term used to describe patterns of violence that occur in surf locations. Surf rage occurs for a variety of reasons, but is usually the result of a violation of a surfing custom or surf localism, where local surfers sometimes resort to violence to discourage others from surfing in their location. Forum, *Law of the Surf*, *supra* note 1, at 228; Nazer, *supra* note 12, at Part V. See generally NAT YOUNG, *SURF RAGE: A SURFER’S GUIDE TO TURNING NEGATIVES INTO POSITIVES* (2000) (expounding on the problem of surf rage and providing solutions to reduce it).

Fortunately, the surfing community has remained relatively unregulated and there are no reported cases involving a negligence claim filed by one surfer against another.<sup>15</sup> In Part II, this Comment examines how tort liability issues have been handled by courts throughout the United States in skiing and snowboarding, two sports that have similarities with surfing through right-of-way customs but have encountered heavy litigation and legislation. This part explores California's stance on skier liability in depth. Part III examines the unique aspects of surfing within the context of skiing liability case precedent in an effort to hypothesize how a modern court would handle a surfing liability claim. Part IV provides different solutions that can be implemented to keep the sport self-regulated by the surfing community, out of the courtroom or legislature, and left in the pure, natural form in which it was discovered. Traditionally and throughout history, the sports industry has relied on various types of self-regulation, particularly alternative dispute resolution through private governing bodies, to resolve conflicts within a given sport and prevent government intervention.<sup>16</sup> This Comment's solution to the potential threat of outside regulation in surfing focuses on a hierarchy of self-regulatory preventative measures<sup>17</sup> that reinforce the already-established customary norms and provide an interior outlet for resolving disputes that keeps these conflicts confined to the surfing community. This hierarchy starts with an internal formalization of the customs, which includes an emphasis on resolving accidents privately between the parties, and ends with a mediation-arbitration hybrid model of dispute resolution before a panel of surfing lawyers that aids

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15. While the United States has not seen a civil claim for negligence or personal injury, cases involving criminal assault have been filed after altercations while surfing. *See, e.g., State v. Gomes*, 995 P.2d 314 (Haw. 2000). In *Gomes*, the defendant was convicted of second-degree assault after punching another surfer in the nose in the water and continuing the fight on the beach. *Id.* at 316-17. This case is an example of surf rage resulting from localism and altercations between surfers.

16. *See generally* Symposium, *Symposium on Sports Law and Alternative Dispute Resolution*, 3 CARDOZO ONLINE J. CONFLICT RESOL. 3 (2001) <http://www.cojcr.org/vol3no1/symposia.html> (discussing "current and future uses of alternative dispute resolution ('ADR') processes in the sports industry").

17. *See* Forum, *Law of the Surf*, *supra* note 1, at 229-30 (explaining that legislative intervention should be a last resort and that self-regulatory measures, such as reinvigorating and publicizing customary norms, are the more appropriate route).

the parties in the settlement process—a solution that provides justice for potential claimants while upholding the values and traditions of the sport.<sup>18</sup>

## II. BACKGROUND: LIABILITY ISSUES IN SKIING AND SNOWBOARDING

Participants involved in recreational activities generally owe a duty of reasonable care to other participants.<sup>19</sup> When an individual violates this duty of care and injury results, there is the possibility for tort liability.<sup>20</sup> Courts examine sports-related negligence claims on a case-by-case basis.<sup>21</sup> However, many claims have been successfully defended on “the traditional belief that a participant assumes the dangers inherent in the sport and is therefore precluded from recovery for an injury caused by another participant.”<sup>22</sup> Recent court decisions have examined this traditional defense and determined that not all participants assume the risk of injury in their respective sport when the injury is a result of gross recklessness or intentional conduct by the other participant.<sup>23</sup>

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18. See generally INT’L SPORTS LAW CTR., PROFESSIONAL SPORT IN THE EUROPEAN UNION: REGULATION AND RE-REGULATION (Andrew Caiger & Simon Gardiner eds., 2000) (explaining the effects of legal intervention on European sports and looking at forms of self-regulation in sport, particularly an internal form of community regulation); SIMON GARDINER ET AL., SPORTS LAW 37-91, 179-267 (3d ed. 2006) (explaining in depth the different types of self-regulatory processes for sport, including alternative dispute resolution).

19. JEFFREY K. RIFFER, SPORTS AND RECREATIONAL INJURIES 84 (1985); see also *Cotillo v. Duncan*, 912 A.2d 72, 82 (Md. Ct. Spec. App. 2006) (stating that the risks assumed by participants in a game, sport, or contest, are only the usual and foreseeable dangers that a similarly situated player reasonably would expect to encounter during that game, sport, or contest); RESTATEMENT (SECOND) OF TORTS § 464 (1965) (defining the standard of conduct to which people must conform generally).

20. See GLENN M. WONG, ESSENTIALS OF AMATEUR SPORTS LAW 411 (2d ed. 1994).

21. RIFFER, *supra* note 19, at 84 (“Whether one participant’s conduct causing injury to another constitutes actionable negligence hinges upon the facts of the case.”). Among the factors that a court will consider are: the sport involved, the age and experience of the participant, a participant’s knowledge of the rules and customs of the sport, and the risks inherent in the sport versus the unforeseeable risks. *Id.* at 84-84; see also WONG, *supra* note 20, at 411.

22. WONG, *supra* note 20, at 411.

23. *Id.* See *infra* notes 43-50 and accompanying text.

### A. Skiing Liability Throughout the United States

Several similarities exist between surfing and skiing that warrant their comparison. First, both sports involve individual participants that use nature, either a mountain slope or wave, as a propulsion mechanism for engaging in the activity (unlike water-skiing which uses a motor-boat to propel the skier).<sup>24</sup> Both require similar equipment in the form of skis, a snowboard, or surfboard to participate.<sup>25</sup> Additionally, the most important similarity between skiing and surfing is the use of the right-of-way custom to promote safety and order among participants.<sup>26</sup> However, unlike surfing, skiing has seen an influx of personal injury and negligence cases arising from accidents and collisions on the slopes.<sup>27</sup> In response to this litigation, various jurisdictions have devised legislation to limit and control ski liability.<sup>28</sup> In Vermont, the legislature enacted a statute whereby an individual accepts the inherent dangers of participating in any sport as long as the risks are obvious and necessary.<sup>29</sup> In contrast, Colorado has been more liberal in allowing for skier liability by mandating that each skier “has the responsibility for knowing the range of his own ability to negotiate any ski slope or trail and to ski within the limits of such ability.”<sup>30</sup>

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24. Compare Encyclopedia Britannica Online, *Skiing*, <http://www.britannica.com/eb/article-9068104/skiing> (last visited Feb. 1, 2008), with Encyclopedia Britannica Online, *Surfing*, <http://www.britannica.com/eb/article-9070442/surfing> (last visited Feb. 1, 2008).

25. Compare Encyclopedia Britannica Online, *Skiing*, <http://www.britannica.com/eb/article-9068104/skiing> (last visited Feb. 1, 2008), with Encyclopedia Britannica Online, *Surfing*, <http://www.britannica.com/eb/article-9070442/surfing> (last visited Feb. 1, 2008).

26. Compare Surfrider Foundation Australia, *supra* note 9, with Breckenridge, Colorado, Mountain Safety: Skier Responsibility Code, <http://breckenridge.snow.com/info/winter/mtn.safety.asp> (last visited Feb. 17, 2008).

27. See Joel Bulleigh, *The Slippery Slope of Ski Tort Reform: Will the Judiciary Uphold Legislative Intent?*—*Jagger v. Mohawk Mountain Ski Area, Inc.*, 59 OKLA. L. REV. 155, 157 (2006).

28. See, e.g., VT. STAT. ANN. tit. 12, § 1037 (1977); COLO. REV. STAT. ANN. § 33-44-109 (1979) (defining the duties of skiers, providing for assumption of risk, and establishing penalties for violating the statute).

29. VT. STAT. ANN. tit. 12, § 1037 (1977).

30. COLO. REV. STAT. ANN. § 33-44-109 (1979) (stating further that “[e]ach skier expressly accepts and assumes the risk of and all legal responsibility for any

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While the legislation in a number of jurisdictions has been important in regulating skier liability, case law has primarily controlled on this issue. Across the United States, skier liability cases have dealt with issues such as the danger inherent in skiing, the duty of care one skier owes to another, and the ski operator's liability.<sup>31</sup> For the purposes of this Comment, the issues surrounding a claim brought by one skier against another for personal injury or negligence will be examined.

In actions brought by one skier against another, custom regarding right-of-way on the slopes has been important enough to warrant a jury instruction and is critical to a finding of skier liability in certain jurisdictions.<sup>32</sup> In *Ninio v. Hight*, one of the first reported skier collision cases, the plaintiff argued that when the defendant collided with her, he violated the unwritten "rule of the road" custom in skiing, which requires an uphill skier to yield to another skier downhill from him or her.<sup>33</sup> After a jury verdict in favor of the defendant, the Tenth Circuit remanded the case for retrial with an instruction that a skier has a duty to use reasonable care to look out, and that the failure to see that which "must have been plainly visible" amounts to negligence.<sup>34</sup> Furthermore, courts have held that downhill skiing is not subject to a contact sports liability exception, which is reserved for team sports where bodily contact is inevitable.<sup>35</sup> This leaves a defendant skier's

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injury to person or property resulting from any of the inherent dangers and risks of skiing; except that a skier is not precluded under this article from suing another skier for any injury to person or property resulting from such other skier's acts or omissions").

31. Joshua D. Hecht, *Snowboarding Liability: Past, Present and Future*, 15 MARQ. SPORTS L. REV. 249, 251 (2004).

32. See, e.g., *Ninio v. Hight*, 385 F.2d 350, 352 (10th Cir. 1967) (finding that, in a collision between an experienced skier and a beginning skier, the trial judge erred by refusing to instruct the jury on the "rule of the road" custom in skiing); Carol Schultz Vento, Annotation, *Skier's Liability for Injuries to or Death of Another Person*, 75 A.L.R.5th 583, 589 (2000).

33. *Ninio*, 385 F.2d at 351.

34. *Id.* at 352.

35. See, e.g., *Novak v. Virene*, 586 N.E.2d 578, 580 (Ill. App. Ct. 1991); *Nabozny v. Barnhill*, 334 N.E.2d 258, 260, 261 (Ill. App. Ct. 1975) (stating that the law should not place "unreasonable burdens on the free and vigorous participation in sports" but that "a player is liable for injury in a tort action if his conduct is . . . either deliberate, willful or with a reckless disregard for the safety of the other



conduct subject to ordinary negligence liability and precludes the defendant from using the doctrine of primary assumption of risk in a skier-versus-skier case.<sup>36</sup> Thus, the early skier collision cases did not apply assumption of risk, but allowed the common law to evolve under principles of negligence, which consider the customs within a sport.<sup>37</sup>

In spite of the early common law approach, the threshold issue of whether collision is an inherent risk of skiing has recently been reexamined by the courts.<sup>38</sup> While some courts have barred primary assumption of risk, a number of courts have declared that there are inherent dangers in downhill skiing and have allowed the jury to determine which risks are obvious in the sport and which extend beyond the reasonable anticipation of a skier.<sup>39</sup> This allows a jury to examine the defense of primary assumption of risk and, absent intentional, reckless or wanton conduct, prevent one skier from recovering from another under a mere negligence action.<sup>40</sup> For example, Vermont case law has strictly adhered to Vermont Sports Injury Statute section 1037, which permits an instruction to the jury on the common law doctrine of primary assumption of risk, whereby a participant in any sport accepts the inherent risks that are obvious and necessary to that sport.<sup>41</sup> Thus, Vermont generally accepts the primary assumption of risk doctrine as a defense to ski collisions and as a mechanism to limit skier liability.<sup>42</sup>

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player"). See also Vento, *supra* note 32, at 590.

36. See Novak, 586 N.E.2d at 580.

37. See, e.g., Seidl v. Trollhaugen, Inc., 232 N.W.2d 236, 240-41 (Minn. 1975). See also 46 AM. JUR. PROOF OF FACTS 3D *Liability of Skier for Collision with Another Skier* § 7 (2008).

38. See generally Diane Bernstein, *The Snowballing Cost of Skiing: Who Should Bear the Risk?*, 7 CARDOZO ARTS & ENT. L.J. 153 (1988) (examining various cases on negligence and the assumption of risk doctrine in the context of skier liability).

39. See, e.g., Dillworth v. Gambardella, 970 F.2d 1113, 1117 (2d Cir. 1992) (applying Vermont state law); Leopold v. Okemo Mountain, Inc., 420 F. Supp. 781, 786 (D. Vt. 1976); Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786, 791 (D. Vt. 1951).

40. See, e.g., Cheong v. Antablin, 946 P.2d 817, 819, 820 (Cal. 1997).

41. VT. STAT. ANN. tit. 12, § 1037 (1977); see also Dillworth, 970 F.2d at 1116-17.

42. Hecht, *supra* note 31, at 252.

Alternatively, other jurisdictions have been more liberal in finding a skier negligent for colliding with another skier.<sup>43</sup> In *Ulissey v. Shvartsman*, the court held that a genuine issue of material fact existed to prevent summary judgment based on whether the plaintiff or defendant was the uphill skier in relation to the other.<sup>44</sup> This court recognized the Colorado Ski Safety and Liability Act, where there is a rebuttable presumption that a skier who collides with another skier is negligent, depending on who the uphill skier is (the one in a better position to avoid the collision).<sup>45</sup> Furthermore, in contrast to Vermont decisions, a Minnesota court in *Seidl v. Trollhaugen, Inc.* held that the evidence was sufficient to support a finding that a skier negligently caused an accident resulting in the injuries to another skier.<sup>46</sup> The court held that although the plaintiff was aware of the inherent risks of skiing, she was not barred by the assumption of risk doctrine because she was unaware of the particular risks surrounding the specific injury she suffered.<sup>47</sup> Likewise, a New York court in *Duncan v. Kelly* held that evidence of a skier being struck from behind by the defendant was sufficient to create a material question of fact and preclude summary judgment.<sup>48</sup> There, the court explained that a downhill skier does not assume the risk of injury caused by another skier's negligence.<sup>49</sup> While a voluntary participant in downhill skiing assumes the usual risks inherent in that activity, another skier's negligent, reckless, or intentional conduct is not included within the range of risks that are assumed.<sup>50</sup> In summary, courts throughout the country have taken a variety of approaches in analyzing tort liability in skiing.

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43. See, e.g., *Ulissey v. Shvartsman*, 61 F.3d 805, 809 (10th Cir. 1995) (stating that, under Colorado law, "there is a rebuttable presumption that a skier who collides with another skier is negligent"); *Martin v. Luther*, 642 N.Y.S.2d 728, 729 (N.Y. App. Div. 1996); *Novak v. Virene*, 586 N.E.2d 578, 580 (Ill. App. Ct. 1991).

44. *Ulissey*, 61 F.3d at 809-10; see also *Vento*, *supra* note 32, at 591.

45. *Ulissey*, 61 F.3d at 809.

46. *Seidl v. Trollhaugen, Inc.*, 232 N.W.2d 236, 240-41 (Minn. 1975).

47. *Id.*

48. See *Duncan v. Kelly*, 671 N.Y.S.2d 841, 842-43 (N.Y. App. Div. 1998).

49. *Id.* at 842.

50. See *id.*; 46 AM. JUR. PROOF OF FACTS 3D *Liability of Skier for Collision with Another Skier* § 8 (2008).

Another useful sport for examining tort liability is snowboarding, which, like surfing, has exploded in popularity in recent years.<sup>51</sup> Although the case law surrounding snowboarding collisions is just beginning to develop, snowboard liability has closely followed ski liability throughout the United States.<sup>52</sup> California and Michigan courts have held that collisions on the slopes are an inherent risk assumed by the snowboarder.<sup>53</sup> Thus, in these jurisdictions, a snowboarder will not be liable for mere negligence.<sup>54</sup> In contrast, Connecticut courts have held that a skier does not voluntarily submit to bodily contact with other skiers and have established a reasonable duty of care to avoid collisions.<sup>55</sup> Thus, based on case precedent, a snowboard collision in Connecticut would most likely be considered under negligence standards.<sup>56</sup>

Furthermore, a snowboarder acting recklessly or violating a skier responsibility code or statute creates a new situation for courts in all jurisdictions. While the California and Michigan courts have held there is no duty of care because primary assumption of the inherent risks of skiing or snowboarding bars liability, reckless or intentional conduct *creates* additional risks that may not be inherent.<sup>57</sup> For example, if a snowboarder chooses to consume alcohol or disregard a safety regulation, his or her conduct may increase the risk of collision.<sup>58</sup> Therefore, tort liability in snowboarding (like skiing),

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51. Hecht, *supra* note 31, at 249.

52. *Id.* at 267.

53. See, e.g., Mastro v. Petrick, 112 Cal. Rptr. 2d 185, 191 (Cal. Ct. App. 2001); Shukoski v. Indianhead Mountain Resort, Inc., 166 F.3d 848, 851 (6th Cir. 1999). See also Hecht, *supra* note 31, at 260-61.

54. Hecht, *supra* note 31, at 260.

55. See, e.g., Jagger v. Mohawk Mountain Ski Area, Inc., 849 A.2d 813, 816, 818 (Conn. 2004). But see Bulleigh, *supra* note 27, at 176 (noting that the court did not abide by legislative intent of the applicable skier statute because the statute plainly states that a skier assumes the risk of collision with other skiers).

56. See Hecht, *supra* note 31, at 261. This proposition assumes that a court would treat snowboarding the same as skiing. *Id.*

57. See *id.*

58. See, e.g., Freeman v. Hale, 36 Cal. Rptr. 2d 418, 423 (Cal. Ct. App. 1994) ("We conclude, therefore, that drinking alcoholic beverages is not an activity within the range of activities 'involved' in the sport of skiing, and that the increased risks presented by the consumption of alcohol are not inherent in the sport of skiing."); Campbell v. Derylo, 89 Cal. Rptr. 2d 519, 524 (Cal. Ct. App. 1999) (holding that

hinges on a variety of factors, including whether a participant assumes the inherent risks of the sport, whether the participant's conduct increases the inherent risks of the sport, and whether a skier responsibility code or statute redefines the duty of care that one participant owes to another.

### *B. California's Stance on Skier Liability*

While the split of authority on skier liability among different jurisdictions is an important consideration when examining tort liability in surfing, the jurisdiction with the most impact is California because the vast majority of surfers are located in this state.<sup>59</sup> In *Cheong v. Antablin*, the court held that the doctrine of primary assumption of risk barred a skier's negligence claim against another who unintentionally injured him in a collision.<sup>60</sup> The court ruled in accordance with past decisions on sport liability and found that a skier owes a duty to fellow skiers not to injure them intentionally or to act recklessly.<sup>61</sup> Further, the court distinguished between primary and secondary assumption of risk, stating that primary assumption of risk involves "those instances in which the assumption of risk doctrine embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk."<sup>62</sup> Secondary assumption of risk, the court continued, involves "those instances in

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primary assumption of risk did not bar recovery by the injured skier because the failure by the snowboarder to wear a retention strap to secure the snowboard to his leg, as required by county ordinance, could have been found by the jury to have increased the risk of injury to others from his runaway snowboard).

59. See *Raise Your Hand If You Surf*, TRANSWORLD SNOWBOARDING, Jan. 5, 2001, <http://www.transworldsnowboarding.com/twbiz/print/0,21538,342958,00.html> ("While surf-shop distribution may not say much about total surfer population, it gives a good idea of the geographic distribution and population density of surfers. Based on these figures, for example, we can deduce that nearly half of the country's surfers live in California.").

60. *Cheong v. Antablin*, 946 P.2d 817, 819 (Cal. 1997).

61. *Id.* at 818-19 (applying the principles set forth in *Knight v. Jewett and Ford v. Gouin*). See generally *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992) (discussing assumption of risk and the duty of care in the context of touch football); *Ford v. Gouin*, 834 P.2d 724 (Cal. 1992) (discussing assumption of risk and negligence in the context of water-skier liability).

62. *Cheong*, 946 P.2d at 820 (citing *Knight*, 834 P.2d at 703).

which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty."<sup>63</sup> While primary assumption of risk acts as a complete bar to a plaintiff's recovery, secondary assumption of risk handles recovery through a comparative fault scheme.<sup>64</sup> The court reasoned that primary assumption of risk applies to co-participants in a given sport because they accept the inherent risks in the activity when they decide to play.<sup>65</sup> Allowing liability for careless conduct would lead to detrimental public policy to the extent that it would curb participation.<sup>66</sup>

However, the plurality opinion in *Cheong* did leave room for argument amongst the California Supreme Court justices over some of the issues involved. Justice Mosk concurred in the result, but wanted to throw out the "confusing, and unnecessary, terminology of 'primary assumption of risk' and analyze the issue as a question of 'duty.'"<sup>67</sup> Mosk explained that the "no-duty rule of *Knight* applies unless it is displaced."<sup>68</sup> To illustrate, Mosk suggested that one form of displacement could be statutory prohibition against specified conduct (otherwise regarded as customary within a given sport) as outside of the participant's general duty of care to another.<sup>69</sup> Thus, the concurring opinions in *Cheong* reveal only a slight majority in California with regard to interpretations of primary versus secondary assumption of risk and the ability of the legislature to dictate a participant's duty of care within sports.

The evolution of ski and snowboard liability law varies throughout the United States. The discrepancies among different jurisdictions leaves open the idea that these principles are not set in stone and future change is not out of the question. Therefore, this Comment's analysis of surfing liability begins with the idea that while some facets of the sport closely resemble skiing and snowboarding,

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63. *Id.* (citing *Knight*, 834 P.2d at 703).

64. *Id.* at 820; 6 WITKIN, SUMMARY OF CAL. LAW 9TH Torts § 1090A (Supp. 2004); WILLIAM F. FLAHAVAN ET AL., CAL. PRACTICE GUIDE *Personal Injury* § 3:238 (1997).

65. *Cheong*, 946 P.2d at 820.

66. *Id.*

67. *Id.* at 823 (Mosk, J., concurring).

68. *Id.*

69. *Id.*

there are a number of unique aspects in surfing that raise new issues of concern for courts.

### III. SURFING LIABILITY IN THE 21<sup>ST</sup> CENTURY: THE UNIQUE ASPECTS

While skiing has seen an influx of litigation resulting in the development of skier liability law, surfing has remained relatively unregulated. In fact, surfing is one of the few activities today that is controlled largely by the customary norms passed on from generation to generation.<sup>70</sup> This is not to say that surfing has not seen a rapid increase in popularity; with the help of movies, television, and the media, the appeal of the sport has exploded in recent years.<sup>71</sup> Like skiing, this expansion comes with the reality that while the population of eager participants increases, the number of slopes and waves remains the same. This dilemma forms the crux of the issue addressed in this Comment: how will the sport of surfing deal with overcrowding without asking the legislature or courts for help? First, this Part will look at how liability issues in surfing are dependent on the surviving customs and unique aspects of the sport. Second, this Part will hypothesize how a court might look at these issues in light of sport tort liability precedent.

#### *A. Surfing Custom and the Additional Issues Presented for Surfing Liability*

Many surfers use surfing to relieve stress and escape from the confines of day-to-day life.<sup>72</sup> As a result of the peaceful aura that surrounds the sport, there is a strong negative reaction by surfers against any type of formal regulation.<sup>73</sup> Similar sports, like skiing and snowboarding, have seen a storied history of legislation and litigation

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70. See Forum, *Law of the Surf*, *supra* note 1, at 229-30.

71. See Scott J. Turner, *Physician Dives into the Relatively Uncharted Waters of Surfing Research*, GEORGE STREET J., Sept. 6, 2002, available at [http://www.brown.edu/Administration/George\\_Street\\_Journal/vol27/27GSJ02d.htm](http://www.brown.edu/Administration/George_Street_Journal/vol27/27GSJ02d.htm).

72. See Forum, *Law of the Surf*, *supra* note 1, at 229.

73. *Id.* at 236 (responding to an online ABC Internet forum in which many surfers expressed rage about the idea of regulating surfing and displayed a "sort of vehemence" in "defense of freedom").

in order to protect participants and punish unjustifiable behavior.<sup>74</sup> This trail of case law and regulation can act as a model to predict what a tort liability action might look like in a surfer-on-surfer collision.

At Southern Cross University's Law of the Surf Forum, conducted in Byron Bay, Australia, Southern Cross Law Professor Stanley Yeo explained what a civil claim in negligence would look like:

The court must first decide whether there was a duty of care owed by one surfer towards another. The answer to this question will inevitably be "yes", since it is clearly the case that the law imposes a duty of care upon one surfer towards another. A more contentious issue is whether that duty of care has been breached. So far as the general rules of the tort of negligence are concerned, what the court will do is to [hypothesize] a reasonable surfer and consider how such a surfer in those particular circumstances might have behaved or what precautions he or she might have taken. Who is this "reasonable surfer"? The answer is that codes of [behavior], custom and general practice would be matters that the court, if called upon to decide, would take into consideration to help define the "reasonable surfer".<sup>75</sup>

Although Professor Yeo is referring to Australian negligence law, United States courts should consider his ideas about how to examine surfer liability. In a similar fashion to the "rules of the road" in skiing,<sup>76</sup> surfing has a well-established, unwritten "code of conduct" for how surfers should act in the water to protect other surfers and avoid danger.<sup>77</sup> Several organizations, including the Surfrider Foundation, have issued various rules of surfing conduct that are customarily accepted across the world.<sup>78</sup> In fact, the Sunshine Coast

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74. See *supra* Part II.A-B.

75. Forum, *Law of the Surf*, *supra* note 1, at 234.

76. See *supra* notes 32-34 and accompanying text.

77. See Brian Fitzgerald & Joanne Harrison, *Law of the Surf*, 77 AUSTL. L.J. 109, 114 (2003).

78. *Id.* See Surfrider Foundation Australia, *supra* note 9. See generally SHAUN TOMSON & PATRICK MOSER, *SURFER'S CODE: 12 SIMPLE LESSONS FOR RIDING THROUGH LIFE* (2006) (providing general rules and lessons in surfing); Sean Collins & Nick Carroll, *Bills of Rights and Lefts: Surfing Etiquette*, in SEAN COLLINS, *SURFLINE'S CALIFORNIA SURF GUIDE: SECRETS TO FINDING THE BEST WAVES* 192, 192-200 (2005) (providing general surfing etiquette); SROsurf.com, *The Unwritten Law of Surfing and the Rules in Black & White*, <http://www.srosurf.com/rules.html>

council in Queensland, Australia has gone as far as posting “surfing etiquette” signs at two of their most popular beaches.<sup>79</sup>

Certain rules or customs are accepted by experienced surfers across the globe.<sup>80</sup> For example, one of the quintessential rules of surfing is that a surfer should not “drop in” on a fellow surfer.<sup>81</sup> Authors and surfers Sean Collins and Nick Carroll describe what entails a “drop-in” in their *Bills of Rights and Lefts: Surfing Etiquette*:

The drop-in happens like this: Surfer A is closest to the curl, paddles into and catches the wave, only to find that Surfer B—the dropper-in—has also caught the wave, from further out on the shoulder. Surfer A is then blocked from making a successful ride. The two surfers may collide, accidentally or deliberately, but it’s unlikely that either will enjoy the wave to its fullest. At some critical surf spots, Surfers A and/or B may even be placed in physical danger as a result.<sup>82</sup>

Another common breach of proper etiquette—usually executed by more advanced surfers—occurs when one surfer “snakes” another surfer.<sup>83</sup> This happens when:

Surfer A, in position and having waited his or her turn, begins to paddle for the wave. Surfer B (the snake) waits until A’s focus is purely on catching the wave, then makes a quick move to the inside and takes off, claiming the wave. If both surfers end up riding, it appears A has dropped in and is in the wrong, yet both surfers, and usually most onlookers, know otherwise.

Snaking can be distinguished from dropping in, in that it’s rarely accidental.<sup>84</sup>

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(last visited Feb. 5, 2008).

79. *New Signs Explain Rules of Surfing*, ABC NEWS ONLINE, Apr. 4, 2007, <http://www.abc.net.au/news/newsitems/200704/s1889357.htm>.

80. See Forum, *Law of the Surf*, *supra* note 1, at 228 (“It is fair to suggest that in today’s overcrowded surf, 99% of surfers still abide by the etiquette of surfing. However, there are a small number of surfing individuals, whose surfing behaviour violates the rules of surfing and provokes verbal abuse and/or physical violence by one surfer towards another surfer.”).

81. See Fitzgerald & Harrison, *supra* note 77, at 114.

82. Collins & Carroll, *Bills of Rights and Lefts: Surfing Etiquette*, in COLLINS, *supra* note 78, at 193.

83. See *id.*



These two norms, while probably the most important in terms of surfing etiquette, are only two of the most commonly accepted rules; various regions have developed several additional rules to provide order to surfing.<sup>85</sup> Many of the collisions in the ocean occur because of inexperienced surfers who lack knowledge of the prevailing customs, or intentional wrongdoers who show a complete and reckless disregard for these surfing rules.<sup>86</sup>

One must weigh a variety of factors and risks when inquiring about the possibility of a tort negligence claim in the sport of surfing. The first consideration is the participants. Surfing produces a variety of participants with ranging skill levels, all of whom compete for the same waves in many situations. In skiing and snowboarding, the slopes are typically divided by skill level depending on how challenging the slope, separating beginner skiers from advanced.<sup>87</sup> However, this type of safety regulation is typically absent in surfing, leaving inexperienced surfers to fend for waves amongst skilled surfers.<sup>88</sup> Different surf locations along the California coast have a variety of attributes, creating a unique and potentially more challenging experience that catch many beginners off guard.<sup>89</sup> For

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84. *Id.*

85. *See id.* at 192-200; Surf rider Foundation Australia, *supra* note 9.

86. *See Law of the Surf Forum Number 2: Law, Culture and Knowledge of Surfing*, 6 S. CROSS U. L. REV. 318, 329 (2002) (suggesting that “rouge” surfers and those who lack knowledge of surfing etiquette are the ones causing the “problems” out in the water), *available at* [http://www.scu.edu.au/schools/lawj/law\\_review/law\\_of\\_surf\\_number2.pdf](http://www.scu.edu.au/schools/lawj/law_review/law_of_surf_number2.pdf). Melanie Mott, President of the All Girls Surfriders Club, explains that “there are always going to be people who won’t show respect to anyone and will not show respect to any rules or even laws.” *Id.* She goes on to point out that, in contrast, education will help to bring awareness to those “behaving badly out of ignorance.” *Id.*

87. *See infra* note 148.

88. *See* Sean Collins & Nick Carroll, *Bills of Rights and Lefts: Surfing Etiquette*, in COLLINS, *supra* note 78, at 192. From the author’s experience, the only mechanisms in surfing to distinguish a beginner location from an advanced location are word-of-mouth from other surfers, surf shops, lifeguards, and reference materials.

89. *See* COLLINS, *supra* note 78, at 14 (“In California we get all kinds of swells with various directions, sizes and swell periods, all of which translate into very different surf conditions all along the coast.”); *see also* Nazer, *supra* note 12, at Part IV.A.2 (describing that one “meta-norm” in surfing is to be sensible about where one surfs and to choose breaks that align with one’s skill level).

example, when considering a location, an experienced surfer will look at the best tide level, the best swell direction, the wind patterns, the ocean-bottom, the best season, the localism factor, the typical board size (short-board or long-board), and any other hazards that may be present.<sup>90</sup> Many beginner surfers do not take these factors into account when they go surfing, increasing the likelihood of harassment, injury, and violence.<sup>91</sup>

The risks involved in this setting are drastically increased when there are inexperienced surfers in the water who either do not know the customs or lack the ability to adequately avoid danger to themselves and others.<sup>92</sup> For example, three important customs widely followed to uphold safety in the water are: use clear and open water to paddle out, stay in the white water as long as necessary, and pay attention so as to not be caught in the line of the surfer riding the wave.<sup>93</sup> All three of these customs attempt to keep surfers who are

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90. See generally COLLINS, *supra* note 78, at 14-41. All of these factors distinguish surfing from skiing. Factors such as tide level, swell direction, and wind patterns dictate not only the size of the waves, but also how the waves are forming. See generally *id.* at 14-41. Therefore, these factors can determine how dangerous the waves may be at any given time. See generally *id.* at 14-41. Furthermore, the ocean-bottom can determine how the waves will form and how dangerous a given area may be for a beginner. See generally *id.* at 14-153. Typically, beginners should learn on beach-breaks or point-breaks with a sand ocean-bottom to avoid the risk of hitting rocks. See *id.* at 19. Many popular and advanced surf breaks occur over a coral or rock ocean-bottom because they change how the wave will form. See *id.* at 20. Many surf locations have a heightened sense of localism, which increases the chances of locals harassing beginning surfers. See generally *id.* at 42-153. Also, some spots are known as areas where most of the surfers will ride longboards (boards that are typically longer than nine feet in length), and other spots may be more suitable for shorter boards. See generally *id.* at 42-153 (describing how most of the California surf locations stack up against these factors).

91. See PETER DIXON, *THE COMPLETE GUIDE TO SURFING* 93 (2001) ("It's usually the novice surfer who gets in trouble because of lack of training, skill, and experience. And often, a foolhardy surfer or beginner endangers someone else's life.").

92. See *id.* at 93-95.

93. Collins & Carroll, *Bills of Rights and Lefts: Surfing Etiquette*, in COLLINS, *supra* note 78, at 194 ("This has its roots in the same thinking behind 'don't drop in'—once a rider has selected and caught a wave, all other surfers should do their best not to interfere with his or her enjoyment of the wave."). This includes using exterior rip tides to paddle out to where surfers are catching waves, commonly called the "take-off point." See *id.* Surfers should also try not to cross into other

paddling to the lineup<sup>94</sup> out of the way of someone riding a wave who may not be able to avoid a collision.<sup>95</sup> In addition, another common problem caused from inexperience occurs when a beginner is either riding or approaching a wave but falls or is forced to “bail out,” letting go of his or her board in the process.<sup>96</sup> When beginners do this, they usually have no idea where they are in the water, how long their leashes will extend, or whether or not other surfers are close to them.<sup>97</sup> In a situation like this, a loose board in the water is a deadly weapon that can cause serious physical injury.<sup>98</sup> As the number of surfers, and presumably the number of inexperienced surfers, continues to rapidly increase, overcrowding at popular surf locations is one of the primary factors that will lead to an increase in injury and physical harm.<sup>99</sup>

While overcrowding is one factor that increases the risk and likelihood of collision in the water, it by no means is the sole reason for increased violence. First, it is important to understand the unique aspects of surfing that separate the sport from other activities. Unlike a ski slope or soccer field, the surfer’s “arena” is the ocean—a fluid, volatile, and challenging environment.<sup>100</sup> This is not to say that a ski slope does not present certain challenges for skiers; however, most

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surfers’ lines (where the wave takes surfers in either a right or left direction). *Id.* Paddling wide of the take-off point and staying in the white water for longer periods of time can ensure that surfers will not get caught in the line of other surfers. *See id.*

94. The lineup is where surfers gather to sit on their boards and wait for waves, usually in close proximity to the take-off point. DIXON, *supra* note 91, at 198.

95. Collins & Carroll, *Bills of Rights and Lefts: Surfing Etiquette*, in COLLINS, *supra* note 78, at 194. Paddling into a fellow surfer’s line is considered a “gross breach of etiquette” and can result in either a collision that cannot be avoided or a “wipeout,” ruining the surfer’s enjoyment of the wave. *Id.* A “wipeout” is “[f]alling or being knocked, blown, or pushed off the surfboard by a collapsing wave or by another surfer.” DIXON, *supra* note 91, at 200.

96. *See* YOUNG, *supra* note 14, at 28.

97. *Id.*

98. *See id.*; *see also supra* notes 5-7 and accompanying text (discussing the serious injuries incurred by surfer Mike Donovan).

99. *See* Nazer, *supra* note 12, at Part I (describing the dilemma that Nazer refers to as the “tragicomedy of the surfers’ commons,” where the number of surfers continues to increase while the number of surf breaks remains constant, leading to an increase in both overcrowding and conflict); *see also supra* note 2 and accompanying text.

100. *See* Forum, *Law of the Surf*, *supra* note 1, at 236.

surfers will agree that no two waves are exactly the same, even in one session.<sup>101</sup> This creates two issues. First, to explain the surfing experience and the nature of waves in a manner that judges and jurors can comprehend would be very difficult. Second, when looking at the issue of liability, intentional and even reckless conduct would be difficult to establish where the surfing environment itself is already inherently reckless and unpredictable.

Furthermore, while overcrowding is certainly a source of problems in surfing, problems can nevertheless arise in the absence of a crowd.<sup>102</sup> Even with only a few people in the water, one surfer may intentionally disregard custom and insist on dropping in on or snaking others at the expense of everyone else's peace of mind and safety.<sup>103</sup> This behavior can be directly linked to disregard for the established and accepted customs, or from a powerful sense of localism, where certain surfers believe they "own" the waves in a particular surf location.<sup>104</sup> In these situations of intentional disregard for safety customs and extreme examples of localism, courts could easily establish a standard of recklessness.

#### *B. Surfing Liability in Comparison to Skiing and Snowboarding: What a Tort Liability Claim Might Look Like*

Certain jurisdictions, such as the Tenth Circuit and various states, including Colorado and New York, have acknowledged custom as an important consideration in determining fault in a skier collision

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101. *See id.*

102. *Id.* at 237-38; *see also* YOUNG, *supra* note 14, at 30 (stating that a fight can break out whenever anything more than a single group of friends is surfing together).

103. *See* Forum, *Law of the Surf*, *supra* note 1, at 238.

104. *See* Nazer, *supra* note 12, at Part V ("Many surfers who've spent years of their lives learning the curves and moods of a powerful and alluring surf spot feel a sense of ownership that makes land-based property rights seem feeble in comparison."). Thus, localism brings a sense of status to surfing, where depending on the intensity of the localism at a given break, the locals will use various measures to intimidate or scare newcomers and protect their waves. *See id.* Nazer splits localism into three categories: mild, moderate, and heavy localism. *See id.* Heavy localism aims at completely excluding non-locals and often includes physical violence or property damage as intimidation tactics. *See id.*

action.<sup>105</sup> These jurisdictions have consistently ruled that a genuine issue of material fact exists as to whether a skier was negligent in failing to yield to a skier downhill from him or her—a commonly followed custom in skiing throughout the world.<sup>106</sup> Furthermore, many of these jurisdictions have refused to apply the primary assumption of risk doctrine, which would bar a negligence claim, to a skier-versus-skier case.<sup>107</sup> Many of these courts would agree that although an individual who participates in downhill skiing assumes the activity's inherent risks, including the risk of personal injury caused by other participants, another skier's negligence, or reckless or intentional conduct, is not within the range of risks that are assumed.<sup>108</sup> Consequently, these jurisdictions would likely consider the only form of safety regulation that surfing has adopted—an unwritten, but widely-followed customary code of conduct. Thus, for these more liberal jurisdictions, evidence as to whether a surfer recklessly or intentionally disregarded these norms could present a triable issue of material fact, precluding a motion for summary judgment and the defense of primary assumption of risk. A ruling of this type presents potentially dire consequences for the future regulation of surfing because the courts' affirmation of surfing's custom as a duty of care could spark legislative intervention via statutory schemes or laws that aim to curb the "harmful" effects of the sport.

Fortunately, for surfing, many of the more liberal jurisdictions in terms of sport liability would lack jurisdiction to hear a surfer-on-surfer liability action. This is because most U.S. surfers reside in California,<sup>109</sup> which has applied the doctrine of primary assumption of risk to skier negligence claims.<sup>110</sup> California's progeny of case law surrounding sports tort liability between co-participants has accepted the limited contact rule, where co-participants in a contact sport voluntarily subject themselves to its inherent risks; and, absent any intentional or reckless conduct, an action in mere negligence is

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105. *See supra* Part II.A.

106. *See supra* notes 43-50 and accompanying text.

107. *See supra* notes 43-50 and accompanying text.

108. *See, e.g.,* *Ulissey v. Shvartsman*, 61 F.3d 805, 809-10 (10th Cir. 1995); *Duncan v. Kelly*, 671 N.Y.S.2d 841, 842 (N.Y. App. Div. 1998). *See also* N.Y. GENERAL OBLIGATIONS LAW § 18-101 (McKinney 2001).

109. *See Raise Your Hand If You Surf, supra* note 59.

110. *See, e.g.,* *Cheong v. Antablin*, 946 P.2d 817, 820 (Cal. 1997).

barred.<sup>111</sup> Therefore, in California, the injured skier suffers the costs of the accident, not the skier who caused the collision by violating both accepted safety custom and county ordinances.<sup>112</sup> This principle, partially rooted in the *Cheong* plurality decision, leaves room for interpretation. Critics have noted that California may be better off applying secondary assumption of risk,<sup>113</sup> where fault is measured against comparative negligence rather than barring the negligence action entirely.<sup>114</sup> Furthermore, California has also held that reckless and intentional conduct by one skier could overcome the defense of primary assumption of risk in those cases where the conduct is outside the ordinary risks of the sport.<sup>115</sup>

Applying this case law to a potential negligence claim in surfing, a court would likely rule that a collision in the water, as in skiing, is an inherent risk of the sport; thus, a mere negligence action would likely be barred by the primary assumption of risk doctrine. It is predictable that a court would follow *Cheong* and ignore any reference to custom so as to avoid finding a duty of care rooted therein. However, this does not preclude intentional or reckless conduct from holding a skier liable in California.<sup>116</sup> An actor's conduct is deemed

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111. *See id.*

112. *See id.* at 820-21 ("Accordingly, we conclude the ordinance, by itself, does not give plaintiff a cause of action."); 46 AM. JUR. PROOF OF FACTS 3D *Liability of Skier for Collision with Another Skier* § 12 (2008).

113. *See, e.g.,* 46 AM. JUR. PROOF OF FACTS 3D *Liability of Skier for Collision with Another Skier* § 12 (2008) ("The case would have been better decided by the court, with perhaps the same result, under California's doctrine of secondary assumption of risk and the peculiar facts of the case.").

114. *See, e.g., Cheong*, 946 P.2d at 823 (Mosk, J., concurring) (reinforcing his concurring and dissenting opinion in *Knight* where he proposed to "discard the confusing, and unnecessary, terminology of 'primary assumption of risk'" and instead focus on duty). While Justice Mosk agreed with the reasoning of the *Cheong* plurality that there was no statutory duty placed on skiers in that case, he left open the idea that a statute might create a duty in other situations where tort liability could result and secondary assumption of risk (i.e., contributory negligence) would be appropriate. *See id.*

115. *See, e.g., Freeman v. Hale*, 36 Cal. Rptr. 2d 418, 423 (Cal. Ct. App. 1994) (holding that a jury could find a defendant's conduct so egregious as to be outside the inherent risks of the sport where the skier was skiing drunk and collided with plaintiff, breaking her neck).

116. *See Cheong*, 946 P.2d at 819 (holding that, "under the applicable common law principles, a skier owes a duty to fellow skiers not to injure them intentionally or

reckless when the actor performs “an act . . . knowing . . . that his [or her] conduct creates an unreasonable risk of physical harm to another, [and] that . . . risk is substantially greater than that . . . necessary to make his [or her] conduct negligent.”<sup>117</sup> One court in California held there was a triable issue of fact as to whether a defendant snowboarder was acting recklessly when he struck a clearly-visible, stationary skier after racing at a high speed down an unfamiliar, advanced run.<sup>118</sup> The primary distinction here is between careless conduct that courts dismiss as commonly occurring “in the heat of an active sporting event,” and reckless conduct, which increases ordinary risks assumed in the sport.<sup>119</sup> This distinction can be directly applied to a surfing collision.

Because courts would likely find that a collision is an inherent risk of surfers’ careless behavior, distinguishing between a careless collision and a reckless one is tantamount to determining whether a liability issue exists. For example, if an experienced surfer, well aware of the customs and inherent dangers of surfing, intentionally disregards these safety norms by either dropping in on or snaking another surfer, and his conduct results in a collision, would he be deemed to have acted carelessly or recklessly? In some respects, this looks eerily similar to the defendant in *Lackner*, where there was a triable issue of fact for the jury.<sup>120</sup> On the other hand, a defendant surfer such as the one in the example above would argue that, just as surfers are generally aware of the risks of carelessly colliding with others or even “wiping out” on their own, it is also generally accepted that some surfers choose to disregard the unwritten laws of the water; thus, the surfer also assumes this risk when paddling out with others. Nevertheless, with enough evidence of a surfer intentionally increasing the already-significant risk of injury in surfing, a California court would likely find a triable issue of fact for the jury to make this important distinction between careless and reckless behavior. With the threat of such a lawsuit looming in the future, it is essential to practice preventative problem solving in order to preserve the unregulated

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to act recklessly, but a skier may not sue another for simple negligence”).

117. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

118. *Lackner v. North*, 37 Cal. Rptr. 3d 863, 874 (Cal. Ct. App. 2006).

119. *Id.* at 871-72 (quoting *Knight v. Jewett*, 834 P.2d 696, 703 (Cal. 1992)).

120. *Id.* at 874.

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essence of surfing while addressing important safety considerations. The last Part of this Comment addresses possible solutions to this ever-emerging and increasingly pertinent problem.

IV. PROPOSED SOLUTIONS: ALTERNATIVE DISPUTE RESOLUTION AS A SAFEGUARD FOR THE FUTURE OF SURFING

Surfing has seen a number of changes in the past few decades. As mentioned previously, the popularity of the sport has exploded throughout the country, resulting in more attention from all sectors of society and an overcrowding concern that only seems to be getting worse.<sup>121</sup> With the number of surfing-related injuries increasing and incidents of surf rage becoming more commonplace in the surfing community, the threat of outside forces stepping in to control and regulate the problems caused in the surf needs to be recognized. Thus, as is common in many practices of law, preventative problem solving can anticipate this potential issue and aid the legal community in appropriately addressing these concerns.

One might wonder: what would be the problem with letting the courts handle tort liability claims in surfing? First, the core nature of surfing preaches a will to be free from the formalities and structure that encompass not only our legal system, but most of society in general.<sup>122</sup> One of the sport's greatest attributes is its ability to strip away the bureaucratic fiber that most people deal with in their day-to-day life. Thus, to allow litigation to control what happens between surfers in the water would be to take away part of what makes the sport so special.<sup>123</sup> Second, it would be very difficult for courts to

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121. See YOUNG, *supra* note 14, at 33 (“[A]s for the existence of a surfing brotherhood, that disappeared long ago in any mass sense—around the same time the industry and competition bodies completed their successful lunge for mainstream—and world-wide—acceptance, and overcrowding in the surf became endemic.”).

122. See *id.* at 30 (“If you paddle out with the right attitude, the ocean will cleanse you. It’s like being a little boy or girl again; it can be like going home to your mother—letting her rock you in her arms. It’s okay, you can relax, your Mother Ocean can soothe the pain. She can help you work it out if you give her a chance.”).

123. See Forum, *Law of the Surf*, *supra* note 1, at 233. Justice Greg James, Judge of the Supreme Court of New South Wales, explained why surfers are fearful of regulation in the sport:

What surfers do not want is . . . to see someone decide that surfers should



make determinations of law based on a sport that is so unique.<sup>124</sup> The interactions between surfers in the water are something most people, including most judges, would be unable to relate to. And third, more appropriate methods exist for handling disputes among surfers without involving expensive and time-consuming litigation to the detriment of the sport's ethos. Therefore, this Comment proposes a hierarchal system by which the surfing community can self-regulate surfing. This will begin with formalizing and publicizing surfing custom and etiquette to give these safety regulations more uniformity. Next, the surfing community needs to encourage disputes to be handled privately before moving to a hybrid model of dispute resolution that will settle conflicts without intervention from the courts. Therefore, a hybrid form of alternative dispute resolution is a practical solution for preserving important rights and upholding justice among surfers while protecting the traditions of surfing.

*A. Different Forms of Commonly Practiced ADR: Negotiation, Mediation, & Arbitration*

Alternative dispute resolution (ADR) comprises all forms of resolving a dispute without litigation.<sup>125</sup> The most common forms of ADR are negotiation, mediation, and arbitration.<sup>126</sup> There are a

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be regulated in the surf, that surfers should have a code set out in such a fashion that it should be enforced, as it was suggested in California, by surf police on jet skis and the horrible thought that you might have to stand on the beach, along side one of those machines they have in the delicatessen, and take a ticket with a number on [it] and wait until your number comes up to be able to enter the water. And the only way that surfers will be able to ensure that they retain the freedom of the sport, the freedom of the waves and the beach, is by being willing to share it.

*Id.*

124. *See id.* at 236. Ian Cohen, founding member of Stop the Ocean Pollution and Clean Seas Coalition, noted that attempting to put the surfing experience in the courtroom and explain the nature of the waves to a judge is very difficult. *See id.* Overall, "[i]t is difficult to explain to a non-surfer what [this experience] is all about." *Id.*

125. ABRAHAM P. ORDOVER & ANDREA DONEFF, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION 5 (2d ed. 2002).

126. *See id.*; H. WARREN KNIGHT ET AL., CALIFORNIA PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION § 2:1 (1992).

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number of reasons people choose ADR instead of litigation.<sup>127</sup> Generally, ADR is typically a faster, cheaper, and more efficient mechanism for resolving conflict between two parties.<sup>128</sup> It has no defined limits in terms of form or type, and several commonly recognized forms of ADR can be very informal or quite formal.<sup>129</sup> Negotiation, a highly informal resolution device, is arguably the “most common method of dispute resolution.”<sup>130</sup> Negotiation is also the basis for most forms of dispute resolution, as it is used for outlaying the rules of the proceeding and choosing the decision maker.<sup>131</sup> Mediation is a form of dispute resolution that has been around since the beginning of civilization.<sup>132</sup> While not recognized in the common law process, it is used today in all types of disputes.<sup>133</sup> It can be required by statute or voluntarily employed through mediation programs governed by local rule.<sup>134</sup> In the mediation process, parties “enlist the aid of a neutral third party to facilitate a negotiation to resolve their joint problem.”<sup>135</sup> Although the proceeding involves a minimum amount of transaction costs and stress, if the parties are not prepared to settle the disagreement, mediation will most likely be unsuccessful.<sup>136</sup> In the last common form of ADR, arbitration, the parties agree to be bound, by contract, to the decision of the arbitrator or panel of arbitrators, and they waive their right to an appeal.<sup>137</sup> While these three forms represent the most commonly practiced forms

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127. ORDOVER & DONEFF, *supra* note 125, at 5.

128. *See id.* at 5-6.

129. *See id.* at 7; KNIGHT ET AL., *supra* note 126, § 1:3 (stating that private ADR has advantages over court-annexed programs in that the proceedings: 1) are private, paid for, and controlled by the parties; 2) are voluntary and require consent from the parties; 3) can be initiated at any time, even before a lawsuit has been filed; and 4) are very flexible and “can be tailored to fit the parties’ specific needs and the demands of the case”).

130. KNIGHT ET AL., *supra* note 126, § 2:1.

131. ORDOVER & DONEFF, *supra* note 125, at 7-8.

132. KNIGHT ET AL., *supra* note 126, § 3:1.

133. *Id.*

134. *Id.* §§ 3.2-3.2.1.

135. ORDOVER & DONEFF, *supra* note 125, at 8.

136. *Id.* at 8.

137. *Id.* at 9.

of ADR, they are by no means exclusive.<sup>138</sup> Thus, ADR can be customized to meet the needs of a particular controversy. With respect to the potential issues surrounding the surfing community, a hybrid model of ADR will be proposed to meet the needs and interest of all parties involved while preserving the purity of the sport as a whole.

*B. A Practical Solution for Resolving Surfing Liability Claims*

While mediation offers many advantages in the ADR setting, this model alone cannot fully meet the needs of the types of surfer collision conflicts discussed in this Comment. In many respects, mediation's informal, flexible, voluntary, and non-binding nature is especially attractive to conflicting parties where the neutral mediator acts as a guide in reaching a beneficial settlement.<sup>139</sup> However, the non-binding effect of mediation will not provide adequate support for upholding surfing's customary norms and will render a settlement for damages between parties very difficult to enforce. Surfing needs to be self-regulated, providing weight and support to its customs in order to uphold safety and justice among the participants.

On the other hand, arbitration can determine parties' legal rights through the binding decision of a neutral third party, reached in a more formal, adversarial process.<sup>140</sup> While the binding effect of arbitration is typically stipulated between parties in advance of any conflict or dispute,<sup>141</sup> there exists a form of judicial arbitration in which a civil claim is filed and then delegated to a private arbitrator or panel of arbitrators.<sup>142</sup> Thus, while arbitration decisions may give

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138. *Id.* at 5.

139. See Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S5 (1989).

140. See John Livingood, *Addressing Bias in Conflict and Dispute Resolution Settings*, 62 DISP. RESOL. J. 53, 55 (2007).

141. See BETTE J. ROTH, RANDALL W. WULFF & CHARLES A. COOPER, *THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE* § 1:2 (2007).

142. *Id.* § 1:3 (“[Judicial arbitration] differs from traditional private contractual arbitration in the following ways: the judicial arbitrator's award is binding only if the parties make it so. They otherwise enjoy the right to a trial de novo[;] the parties to a judicial arbitration often come together by accident, while parties to private arbitration generally are disputing rights and obligations created by a contract between them[;] the involvement of the court in private arbitration is limited to compelling arbitration or to matters dealing with the enforcement of the award[;]”)

weight to the customs in surfing by creating a binding agreement, there are disadvantages to using this method. First, participants do not enter a contract to surf. Second, resolving these claims through judicial arbitration is very similar to adjudicating them in court, and it begins to impede on the very values that surfers are trying to protect by proposing alternatives to litigation.

Thus, a hybrid model that incorporates the different advantages of negotiation, mediation, and arbitration is the appropriate method for resolving disputes between two surfers. One example is mediation-arbitration (sometimes referred to as “med-arb”), which starts in mediation and ends in arbitration if the mediation is unsuccessful.<sup>143</sup> The parties use the same neutral third party as both the mediator and arbitrator, which allows them to attempt to resolve the dispute through an informal arrangement before moving to a binding arbitration.<sup>144</sup> A hybrid model such as this should be instituted for small claim disputes between two surfers who suffer injuries from a collision in the water.

For a model like this to be successful, some form of regulation must be established in the surfing community—but not by the legislature or the courts. An exterior surfing organization like the Surfrider Foundation or the Association of Surfing Lawyers should proactively address some preliminary concerns, which together constitute the initial step in the hierarchy of self-regulation.<sup>145</sup> A

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unless otherwise provided, in private arbitration, discovery is more limited, and evidentiary rules are more relaxed[.] [N]otwithstanding these caveats, court rules often do allow for voluntary submission to court-annexed arbitration.”).

143. *Id.* § 1:6. See generally William H. Ross & Donald E. Conlon, *Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration*, 25 ACAD. MGMT. REV. 416 (2000) (comparing and evaluating hybrid third-party dispute resolution procedures).

144. Ross & Conlon, *supra* note 143, at 417.

145. See generally J. Mark Ramseyer, *Products Liability Through Private Ordering: Notes on a Japanese Experiment*, 144 U. PA. L. REV. 1823, 1827-37 (1996). Japanese firms, in the realm of products liability, voluntarily accepted a strict products liability scheme. Here, the Product Safety Council was established to delegate safety standards for various hazardous products—a private liability regime that was almost entirely extralegal. Through this system, the Council was ultimately able to raise the legal standard for products liability in Japan (from one of simple negligence). *Id.* This serves as an excellent example of an organization instituting a form of self-regulation (here for a collection of commercial firms with respect to products liability standards) via non-legal forums. The Council took the initial step in the self-regulation hierarchy by first recognizing the types of norms or standards

strong effort needs to be made to formalize the most important surfing customs and promote these norms along the coast. This can be accomplished by posting flyers at some of the most popular surf locations,<sup>146</sup> teaching formalized customs in surf schools, teaching lifeguards and beach patrol officers about how the customs interact, and using surf shops as a vehicle for spreading the word of custom.<sup>147</sup> Although many of the customs are not disputed by surfers, this effort will start the process of solidifying these customs as rules of etiquette, which will help promote safety and order in the water. In addition, the surfing community must pay more attention to informing beginning and inexperienced surfers of the different factors they should consider before entering the water. For example, local groups of surfers and surfing organizations could work towards designating certain areas as either beginner, intermediate, or advanced, thereby giving guidance to beginning surfers or surfers unfamiliar with the area.<sup>148</sup> Increasing

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that they wished to either change or reinforce. *Id.*

146. See, e.g., Nazer, *supra* note 12, at Part VI.A (commenting on the rare example of Santa Cruz's attempt to reinforce norms by distributing brochures explaining surf custom).

147. See *id.* (discussing norm reinforcement as one response to localism and surf violence). The process of disseminating rules and regulations to the public is used to control behavior in a variety of settings. For example, national parks (although governed by the National Park Service) post rules and regulations throughout the park to alert the public of prohibited behavior. This includes regulations for how to approach and react to wildlife, permitted camping or hiking areas, fishing regulations, etc. See *generally* Yellowstone National Park Rules and Regulations, <http://www.nps.gov/yell/planyourvisit/rules.htm> (last visited Feb. 12, 2008). Although the surfing community exercises a more private form of self-regulation, the ability to control behavior through notice of rules and regulations is an important and necessary step towards regulating this activity and the surfing environment.

148. See YOUNG, *supra* note 14, at 27 (explaining Beau Young's suggestion of instituting rankings for different breaks to avoid the problem of several beginners surfing next to experienced surfers at the same break). The best example of someone assigning a natural environment with different skill level recommendations is a ski resort, where trail maps are used to designate different slopes based on their inherent difficulty. The distinction between a green (beginner) slope and a double black diamond (extremely advanced) is almost universal and provides notice to participants. See *generally* Breckenridge, Colorado, Mountain Maps, <http://breckenridge.snow.com/info/winter/mtn.maps.asp> (last visited Feb. 17, 2008) (providing a link to an Interactive Trail Map that depicts the various ski slopes on the mountain); Breckenridge, Colorado, Mountain Safety, <http://breckenridge.com>.

awareness of the unique aspects and hidden dangers of surfing will only work towards reducing injury for inexperienced surfers and dispelling hostility from local surfers. Second, in addition to promoting the enforcement and formalization of custom, the surfing community needs to emphasize that resolving disputes privately and immediately upon injury is the best course of action. Surfers need to understand (and most do) that their sport is unique and that they are inherently charged with upholding the values of the sport by recognizing when they are at fault and compensating for that injury. For those disputes that cannot be handled privately between the parties, the proposed form of ADR will be instituted to aid in settlement. Lastly, the organization needs to develop a group of surfing lawyers that can act as mediators/arbitrators of these disputes while giving proper weight and respect to surf customs. These third-party neutrals<sup>149</sup> will be able to appropriately apply custom to individual cases, help resolve disputes, and create a sense of extra-judicial justice for the participants of the sport. For this type of dispute resolution to be successful, both parties must voluntarily submit to the process. They can then present their arguments to a neutral third party who has knowledge of, and experience with, the customs of the sport. Obviously, while participation cannot be made mandatory at the outset, the goal is that the benefits of private resolution will attract surfers, beginners and experts alike, to this process and away from the courts.

The med-arb hybrid model of dispute resolution provides a safeguard for surfing by insulating potential surfer liability claims from the courts and creating an alternative forum for resolving them. Yet, ironically, the only way to completely insulate the sport is through legislation. While establishing a med-arb model for surfer disputes creates one possible solution for resolving claims, the option of filing a formal complaint still remains. The only way to make a

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[snow.com/info/winter/mtn.safety.asp](http://snow.com/info/winter/mtn.safety.asp) (last visited Feb. 17, 2008) (providing general information on skier responsibility and safety).

149. General conflict of interest and bias rules of professional responsibility would apply for these surfer arbitrator/mediators. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007) (stating that a judge should disqualify himself or herself where his or her impartiality “might reasonably be questioned”); *see also* MODEL RULES OF PROF’L CONDUCT R. 1.12 (2002) (discussing ethical obligations of lawyers who act as third-party neutrals).

med-arb model the mandatory procedure for resolving surfing disputes is through a statutory scheme whereby the courts take complaints and delegate them to the appropriate med-arb panel. However, this approach should be considered a last resort. The key to protecting the sport from outside forces is emphasizing self-regulation within the surfing community. It starts with surfing organizations and extends through every participant who assumes the risks of the activity and accepts responsibility for upholding the tradition, ethos, and etiquette of the sport. To some, it may seem impractical to place the primary responsibility of upholding order in the hands of the participants, but surfing has lasted since its inception without outside regulation and with a common understanding that the future of the sport depends on mutual respect for the implemented self-regulation processes;<sup>150</sup> thus, there is hope that the sport can continue to exist without the aid of restrictive outside regulations.

## V. CONCLUSION

The bottom line is that, to the extent possible, surfing and the law should not be mixed. Almost every aspect of our society has some form of regulation that attempts to curb detrimental behavior and instill order among the people. However, surfing has survived this trend by relying on custom and etiquette to provide the type of order that a legislature or court would otherwise impose.<sup>151</sup> This Comment has outlined the trends in litigation for the similar sports of skiing and snowboarding regarding personal injury claims for injuries suffered while participating in the sport. Some jurisdictions have showed an inclination towards holding a participant liable for his or her reckless injury-causing behavior.<sup>152</sup> While probable outcomes of surfing liability claims can be derived from California's stance on sports tort liability, the different jurisdictional trends show how these issues are still in flux. California courts would most likely hold that one surfer is

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150. See Forum, *Law of the Surf*, *supra* note 1, at 228 ("It is fair to suggest that in today's overcrowded surf, 99% of surfers still abide by the etiquette of surfing.").

151. See *id.* at 229-30 (arguing for reinforcement of surfing norms "that have been employed by surfers for generations to bring order to surfing"); Nazer, *supra* note 12, at Part IV (quoting Yale Law School's surfing Dean, who said that "[surfing] norms comprise the 'universal implied jurisprudence' of surfing").

152. See *supra* Part II.A-B.

not liable to another for mere negligence in the water based on the doctrine of primary assumption of risk, where a surfer assumes the risk of a collision injury.<sup>153</sup> However, there is some confusion around the primary assumption of risk defense, and surfing has some unique aspects that the court might consider when one surfer recklessly disregards known customs in the water. In addition, if the instances of overcrowding and violence continue to increase, the courts and legislature could take notice and decide to take action.

In proactive response, the surfing community needs to recognize that self-regulation is important and necessary to protect the sport from outside regulation. The sport already self-regulates through customary norms;<sup>154</sup> however, these need to be more formalized by the surfing community. This important step will solidify and support these customs as rules of etiquette that aim to govern actions in the water. Furthermore, the surfing community must promote handling disputes privately between parties. Just as parties to an automobile collision decide to handle their dispute without intervention from the police, surfers can decide who violated the rule of etiquette and, accordingly, who is at fault. If the parties are unable to privately resolve the dispute, the med-arb hybrid model will provide a forum where a neutral third party with knowledge of the sport can help determine fault and settle the conflict.<sup>155</sup> This system of ADR, custom-designed for surfing conflicts, is the ideal supplement to help the surfing community self-regulate the sport and keep outside forces at bay.

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153. See *supra* Part III.B.

154. See *supra* notes 77-85 and accompanying text.

155. See ROTH ET AL., *supra* note 141, § 1:6.

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